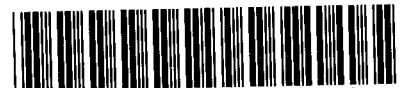


OPEN MEETING ACT/ADA FILM ORIGIN
EXCEPTION



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BEFORE THE ARIZONA CORPORATION COMMISSION

2008 MAR -3 P 4: 32

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**IN THE MATTER OF THE APPLICATION
OF DIECA COMMUNICATIONS DBA
COVAD COMMUNICATIONS COMPANY,
ESCHELON TELECOM OF ARIZONA, INC.,
MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC., MOUNTAIN
TELECOMMUNICATIONS, INC., XO
COMMUNICATIONS SERVICES, INC. AND
QWEST CORPORATION REQUEST FOR
COMMISSION PROCESS TO ADDRESS KEY
UNE ISSUES ARISING FROM TRIENNIAL
REVIEW REMAND ORDER, INCLUDING
APPROVAL OF QWEST WIRE CENTER
LISTS.**

DOCKET NOS. T-03632A-06-0091
T-03406A-06-0091
T-03267A-06-0091
T-03432A-06-0091
T-04302A-06-0091
T-01051B-06-0091

**QWEST CORPORATION'S
EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED OPINION AND
ORDER** **DOCKETED**

MAR 3 2008

DOCKETED BY

Qwest Corporation respectfully submits these exceptions to the Recommended Opinion and Order issued by the Administrative Law Judge on February 22, 2008.

I. INTRODUCTION

This Recommended Opinion and Order (the "Recommended Order") substantially approves the matters agreed upon by the parties to the Joint Settlement. However, the Recommended Order overlooks one of the primary reasons for which the docket was originally

1 instituted—Commission approval of the initial list of wire centers that are no longer impaired,
2 not just for the Joint CLECs that signed the settlement agreement, but for all carriers. Secondly,
3 the Recommended Order essentially issues an advisory opinion on the meaning of the Settlement
4 Agreement with regard to when the count of affiliated fiber-based collocators should be made.
5 The Recommend Order misinterprets the terms of the Settlement Agreement regarding when the
6 initial non-impaired wire center designation is made, in a way that gives subsequent events
7 retroactive recognition, contrary to the federal rule.

8
9 **II. THE ORDER SHOULD DECLARE THAT THE INITIAL LIST OF NON-**
10 **IMPAIRED WIRECENTERS IS APPROVED WITHOUT LIMITING THE APPROVAL**
11 **TO THE CLECS SIGNING THE SETTLEMENT AGREEMENT.**

12 At the outset of this proceeding, Qwest sought Commission approval of the initial list of
13 non-impaired wirecenters for all carriers, including those who had notice of the proceeding but
14 chose not to participate. The Commission should modify the Recommended Order to make it
15 applicable to all CLECs, because it would be highly inefficient to litigate the question separately
16 for each CLEC, and because every CLEC was in fact notified of the proceeding and had
17 opportunity to participate, both before and after the Settlement Agreement was filed.

18 Extending the Commission approval of the initial list of non-impaired wire centers to
19 apply to all carriers is reasonable and supported by the record. The criteria for determination are
20 universal criteria; if a wire center is found to meet the non-impairment criteria that designation
21 necessarily applies for the entire industry. There are not any individual carrier exemptions or
22 fact-specific criteria that would modify the designation on a carrier-by-carrier basis. Further, the
23 list of non-impaired wire centers attached to the Settlement Agreement is identical to the list
24 originally filed by Qwest. The Commission Staff did not oppose the non-impaired designations
25 of the initial wire centers, so it can be inferred the Staff would not oppose application of the list
26 to other carriers.

1 Qwest concurs with the findings in paragraphs 53 and 55 of the Recommended Order, but
2 states that other CLECs can, and should, be bound to the initial list of non-impaired wire centers
3 for the reasons stated above. Qwest respectfully requests that in order to foreclose an
4 interpretation of the Order that would lead to duplicative litigation over the same matters that
5 have been resolved in this docket, the Commission should add the following language to the
6 Order: "The initial list of non-impaired wire centers is approved and shall be applicable to all
7 CLECs."

8 9 **III. COUNTS OF FIBER-BASED COLLOCATORS IN FUTURE PROCEEDINGS**

10
11 The Recommended Order's provisions regarding counting affiliated fiber-based
12 collocators after the date Qwest first makes its designation, should be omitted or reversed,
13 because: (1) It is an advisory opinion based on an interpretation of the Settlement Agreement
14 that has not been raised as a current dispute or controversy; (2) the interpretation that the
15 "effective date of designation" is the equivalent of the "designation date" is not an interpretation
16 held by any party to the agreement; and such interpretation would directly conflict with the
17 federal rule that the Recommended Order otherwise purports to follow.

18
19 A. The Commission Should Not Rule On Matters that Do Not Arise Out of a Real Case or
20 Controversy, and That Have Not Been Heard In The Context of A Real Case or
21 Controversy

22 Qwest asks for the reversal or omission of the provisions of the Recommended Order
23 concerning how the Settlement Agreement should be interpreted in a future Qwest case in which
24 there occurs a change in the number affiliated fiber based collocators between the time Qwest
25 filed a new designation of non-impaired wire centers and when the Commission rules on that
26 filing. There is not any set of facts presented in this phase of the proceeding that require that

1 determination to be made, and therefore Qwest asks that it not be decided now, based on the
2 general principle that there is not a current case or controversy. The issue of the interpretation of
3 the Settlement Agreement was not a matter identified for the hearing.

4 None of the parties to the Settlement Agreement have raised questions over whether the
5 "designation effective date" is the same as the "designation date" and what should happen under
6 the Settlement Agreement if there are changes occurring in the number of fiber based collocators
7 between the filing date and effective date. That question of contract interpretation was not
8 raised by Staff as a matter about which it sought clarification. The interpretation was not given
9 full hearing, as it would be in the course of an adjudication of a real case or controversy over
10 actual facts.

11
12 B. The Recommended Order Correctly Recognizes That It Is the ILEC That Designates
13 Wire Centers As Non-Impaired, But Errors By Equating the Designation Date with the
14 Designation Effective Date.

15 The Recommended Order correctly reaches the same conclusion as did the Washington
16 Utilities and Transportation Commission that the ILECs, not the FCC or state commissions,
17 make the non-impairment designations for wire centers, applying the criteria stated in the federal
18 rules. The Washington Commission stated that rule as follows:

19 If a wire center meets the FCC's criteria at the time an ILEC designates the wire
20 center, but does not meet the criteria when applying data from a later period of
21 time, the wire center designation would change, contrary to the FCC's rules.
22 Thus, we find that state commissions must evaluate the most current data
23 available when the ILECs designated the wire center as non-impaired.
24 Specifically, state commissions must consider the number of fiber-based
25 collocators in the particular wire center on the date the ILEC designates the wire
26 center as non-impaired and the annual ARMIS 43-08 business line data available
on the designation date. (Order 06, Washington State Utilities and Transportation
Commission, Docket UT-053025, ¶34; Hearing Exhibit Q-16, Emphasis added,
footnotes omitted).

The Recommended Order also correctly acknowledges that changes that occur after the

1 designation may not be taken into account. These principles mean that Qwest's determinations
2 under the rule may not be changed because of subsequent mergers among fiber-based
3 collocators. The date Qwest makes the determination, not the date the Commission decides to
4 approve, is the controlling date. That is where the Recommended Order goes off track—it fails
5 to distinguish that the filing date (which Qwest concedes is the determination date) is necessarily
6 a date preceding the date the Commission decides any dispute over the filing and issues its
7 approval of the list. No witness for the parties to the agreement equated the two dates. To
8 interpret the two distinct events (filing and approval) as merged into the latter date by an
9 interpretation of the agreement would have the effect of wiping out the very rule the Commission
10 recognized at the beginning of its analysis.

11
12 C. The Evidence Shows that the Designation Date and the Effective Date For the
13 Designation are Not the Same Date

14 None of the witnesses espoused the interpretation that is adopted by the Recommended
15 Order. On the other hand, the Settlement Agreement contains multiple references to
16 “designation(s).” For purposes of this issue, it is clear that the important date and event is when a
17 new identification is made by Qwest, and Qwest files an updated list. That “designation” is
18 separate and distinct from the Commission approval of the list, which approval triggers its
19 effectiveness for implementation in the parties' dealings.

20 “Filing Date” is a defined term, demonstrating that the filing date refers to when Qwest
21 submits its “designation”:

22 “Filing Date” is the date on which Qwest submits its non-impairment or tier
23 designation filing with supporting data, as describe in Section VI of the
24 Settlement Agreement to the Commission for review[.] (Settlement Agreement,
p. 3, emphasis added.)

25 Thus, it is clear that designation, while that word is used frequently in the Settlement Agreement,
26 first occurs at the Filing Date.

1 Section VI. of the Settlement Agreement contains many elements that make it clear the
2 Settlement Agreement contemplates two events, the filing of a “designation” and the subsequent
3 approval of the “designation.” The caption of Section VI is: “Future Qwest Filings To Request
4 Commission Approval of Non-Impairment Designations.” (Id, p. 8). Section VI. C. states, “At
5 least five (5) days prior to filing new non-impairment or tier designations for Commission
6 review, Qwest will request a protective order[.]” (Id., p. 9, emphasis added).

7 On the other hand, the “Effective Date of Non-Impairment Designation” is the date that
8 follows later in time, and occurs when the process of review is completed and the Commission
9 approves the designation. (See Settlement Agreement Sections VI.F. 2, 4, and 5). That the
10 Settlement Agreement uses the word “designation” in connection with that event does not mean
11 that the first date, when Qwest identified the wire centers, was not the date that serves as the cut-
12 off for changes in data.

13 As used in the Settlement Agreement, the word “designation” might have been
14 substituted with the word “list.” Regardless of the choice of words, the important event is when
15 the ILEC (Qwest) identifies (determines, or designates) the list. The sense of the rule is that
16 once a determination is made by the ILEC properly applying the rules to the competitive facts at
17 that time, and the process for approval is begun, subsequent changes to competitive facts while
18 the approval is pending should not be taken into account.

19 20 D. Public Policy Considerations

21
22 Sound public policy considerations support the federal rule. As the federal court in
23 Michigan has found,

24 [T]he FCC determined that disputes regarding nonimpairment designations must
25 be resolved based upon the facts at the time of a designation. These
26 specifications certainly preclude the MPSC from requiring data relative to counts
after the date of designation. The count at the time of designation is what
matters. *Mich. Bell Tel. Co. v. Lark*, 2007 U.S. Dist. LEXIS 33682 at *12

(Emphasis added.)

The reason for this rule is that it promotes certainty, and discourages protracted disputes. Regulatory proceedings may take months (and perhaps years) to conclude. The interpretation of the Settlement Agreement made by the Recommended Order could well provide an incentive for a CLEC to do whatever is needed to delay Commission approval if a merger or acquisition is even remotely possible. This potential gamesmanship would disadvantage Qwest competitively, as well as financially, by denying it the relief that the FCC intended.

For the foregoing reasons, the portions of the Recommended Order regarding future filings made pursuant to the Settlement Agreement, requiring that affiliate status of a fiber-based collocators up to the date of the Commission Order may be considered by the Commission in resolving disputes concerning Qwest's designation filing, should be modified as follows:

Page 24, Line 25 through page 25, line 10.

In resolving disputes about designations, the Commission must review the most recent data available to the ILECs at the time of their designation. The FCC gives no guidance on how to determine the designation date. Under the terms of the Settlement Agreement, the parties have agreed that if no party objects to Qwest's additions to the non-impairment list within 30 days of Qwest's filing with the Commission, the effective date of the designation shall be 30 days after the filing date, or as otherwise ordered by the Commission. If a party objects to a designation, the Settlement Agreement provides that the parties will request the Commission to use its best efforts to resolve the issue in 60 days. ~~In case of such disputes, the effective date of the designation would appear to be the effective date of the Commission Order resolving the dispute. Thus, under the terms of the Settlement Agreement, the date of the designation would appear to be either 30 days after the filing Date, if no dispute, or if there is a dispute, the date of a Commission order.~~ If there are no objections filed, we would be reasonable to presume that the affiliate status of the fiber-based collocators is not an issue. We find that there is no current controversy concerning this matter and that Staff's concern is, therefore, strictly hypothetical and not ripe for determination as part of this proceeding. Setting this matter aside for determination at the time of an actual objection to a future Qwest filing would not prejudice any party and would allow for a decision to be made based on the specific facts involved. If an objection is filed, the Commission should review the most recent data available to

1 it, which would be information available up to the time of a Commission Order.
2 We believe this interpretation comports with the terms of the Settlement
3 Agreement, as the Settlement Agreement does not consider a disputed designation
4 effective until the date of a Commission Order. We find that "designation date"
5 and "effective date of designation" to be equivalent. We also believe our
6 interpretation comports with the FCC's rules that once a wire center is designated
7 as non-impaired, it can not later be changed based on changed circumstances,
8 since the designation is not effective until a Commission Order. We find too that
9 it promotes the public policy of allowing this Commission to use the most recent
10 information available on the state of competition in resolving designation
11 disputes. This is particularly important because of the FCC's rules that once a
12 designation of non-impairment has been made, changed circumstances will not
13 affect that designation. Consequently, we do not adopt Staff's recommendation
14 on this issue.

8 Finding of Fact # 49.

9 Consistent with the terms of the Settlement Agreement that provides a designation
10 of non-impairment is not effective until 30 days after a filing, or as ordered by the
11 Commission, or in In the event of an objection to a future Qwest's non-impaired
12 designation filing, at the date of a Commission Order, all parties will have the
13 opportunity to present data and related legal argument associated with relating to
14 the affiliate status of a fiber-based collocator, that is available up to the date of the
15 Commission Order may be considered for consideration by the Commission in
16 resolving disputes concerning Qwest's future non-impaired designation filings.

13 Ordering Paragraph – Page 32, line 28 through Page 33, line 3.

14 IT IS FURTHER ORDERED that in future filings made pursuant to the
15 Settlement Agreement, data relating to the affiliate status of a fiber-based
16 collocator ~~that is available up to the date of the Commission Order~~ may be
17 considered by the Commission in resolving disputes concerning Qwest's
18 designation filing.

18 ///

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1 RESPECTFULLY SUBMITTED this 3rd day of March, 2008.

2
3 QWEST CORPORATION

4
5
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